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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 BRIAN FOWLER,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of Social Security,¹

15 Defendant.

CASE NO. 3:16-CV-05631-DWC

ORDER ON MOTION FOR
ATTORNEY'S FEES

16 Plaintiff Brian Fowler filed a Motion for Equal Access to Justice Act (EAJA) Attorney
17 Fees and Expenses. Dkt. 16. Defendant asserts her position in this matter was substantially
18 justified and requests no fee be awarded. Dkt. 17. Pursuant to 28 U.S.C. § 636(c), Federal Rule
19 of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter
20 heard by the undersigned Magistrate Judge. *See* Dkt. 6.

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23 ¹ Nancy A. Berryhill became the Acting Commissioner of Social Security on January 23, 2017, and is
24 substituted as Defendant for former Acting Commissioner Carolyn W. Colvin. 42 U.S.C. § 405(g); Fed. R. Civ. P.
25(d)(1).

1 The Court concludes Defendant's position was not substantially justified. Accordingly,
2 Plaintiff's Motion is granted.

3 **Background and Procedural History**

4 On January 11, 2017, the Court found the ALJ erred in finding Plaintiff's diagnosis of
5 migraines was not a severe impairment at Step Two of the sequential evaluation process. Dkt. 14.
6 The Court found the error was harmful, reversed the ALJ's decision, and remanded the case to
7 the Social Security Administration ("Administration") for further consideration pursuant to
8 sentence four of 42 U.S.C. § 405(g). *Id.*

9 On March 14, 2017, Plaintiff filed the Motion. Dkt. 16. Defendant filed a Response, Dkt.
10 17, and on March 27, 2017, Plaintiff filed his Reply. Dkt. 18.

11 **Discussion**

12 In any action brought by or against the United States, the EAJA states "a court shall
13 award to a prevailing party other than the United States fees and other expenses . . . unless the
14 court finds that the position of the United States was substantially justified or that special
15 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). According to the United
16 States Supreme Court, "the fee applicant bears the burden of establishing entitlement to an award
17 and documenting the appropriate hours expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437
18 (1983). The government has the burden of proving its positions overall were substantially
19 justified. *Hardisty v. Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010) (citing *Flores v. Shalala*,
20 49 F.3d 562, 569-70 (9th Cir. 1995)). Further, if the government disputes the reasonableness of
21 the fee, it also "has a burden of rebuttal that requires submission of evidence to the district court
22 challenging the accuracy and reasonableness of the hours charged or the facts asserted by the
23 prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th
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1 Cir. 1992) (citations omitted). The Court has an independent duty to review the submitted
2 itemized log of hours to determine the reasonableness of hours requested in each case. *See*
3 *Hensley*, 461 U.S. at 433, 436-37.

4 **I. Substantially Justified**

5 In this matter, Plaintiff was the prevailing party because he received a remand of the
6 matter to the administration for further consideration. *See* Dkt. 14, 15. To award a prevailing
7 plaintiff attorney's fees, the EAJA also requires finding the position of the United States was not
8 substantially justified. 28 U.S.C. § 2412(d)(1)(B).

9 The Supreme Court has held "substantially justified" means "'justified in substance or in
10 the main' -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v.*
11 *Underwood*, 487 U.S. 552, 565 (1988). A "substantially justified position must have a reasonable
12 basis both in law and fact." *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (*citing*
13 *Pierce*, 487 U.S. at 565; *Flores v. Shalala*, 49 F.3d 562, 569 (9th Cir. 1995)). The Court "'must
14 focus on two questions: first, whether the government was substantially justified in taking its
15 original action; and second, whether the government was substantially justified in defending the
16 validity of the action in court.'" *Id.* at 1259 (*quoting Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir.
17 1988)). Thus, for the government to prevail, it must establish both the ALJ's underlying conduct
18 and its litigation position in defending the ALJ's error were substantially justified. *Id.* "[I]f 'the
19 government's underlying position was not substantially justified,'" the Court must award fees
20 and does not have to address whether the government's litigation position was justified. *Tobeler*
21 *v. Colvin*, 749 F.3d 830, 832 (9th Cir. 2014) (*quoting Meier v. Colvin*, 727 F.3d 867, 872 (9th
22 Cir. 2013)). The Court notes the Administration does not have to prevail on the merits for the
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1 Court to conclude the Administration's position was substantially justified. *See Kali*, 854 F.2d at
2 334.

3 Here, the Court concluded the ALJ erred in failing to find Plaintiff's migraines to be a
4 severe impairment at Step Two of the sequential evaluation process. Dkt. 14. The Court found
5 the ALJ failed to discuss objective medical evidence showing Plaintiff was diagnosed with and
6 treated for migraines. Furthermore, the ALJ gave great weight to the opinion of Dr. Robinson,
7 but failed to consider his opinion that Plaintiff's migraines are a severe impairment. *See* AR 21,
8 30. As the ALJ failed to discuss significant, probative evidence regarding Plaintiff's migraines,
9 the Court found she erred in finding Plaintiff's migraines were not a severe impairment at Step
10 Two. *See* Dkt. 14; *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (an ALJ "may not
11 reject significant probative evidence without explanation").

12 The Court also found the ALJ's reasons for finding Plaintiff's migraines not to be a
13 severe impairment were insufficient. *See* Dkt. 14. The ALJ found inconsistencies between
14 Plaintiff's complaints of migraines and the record; however, she failed to adequately explain the
15 alleged inconsistencies. *See id.*; *see Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)
16 (an ALJ must provide clear and convincing reasons to reject a claimant's testimony). She also
17 failed to consider the entire record when finding Plaintiff's complaints were inconsistent with the
18 record. Dkt. 14; *see Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (finding an ALJ
19 must not "cherry-pick" certain observations without considering their context).

20 After finding the ALJ erred, the Court concluded the error was harmful because, had the
21 ALJ properly considered Plaintiff's migraines at Step Two, she may have found Plaintiff met a
22 Listing at Step Three and the residual functional capacity assessment and hypothetical question
23 posed to the vocational expert may have included additional limitations. *See* Dkt. 14.

1 Defendant argues her position was substantially justified because her “harmless error”
2 argument had a reasonable basis in law and fact; however, Defendant does not argue the ALJ’s
3 underlying decision was substantially justified. Dkt. 17. As stated above, the Court found the
4 ALJ failed to properly consider significant, probative evidence when determining if Plaintiff’s
5 migraines were a severe impairment at Step Two. *See* Dkt. 14. Further, the ALJ failed to provide
6 adequate reasons for finding Plaintiff’s migraines to be “not severe.” *Id.* As the ALJ failed to
7 discuss significant, probative evidence and failed to provide specific and legitimate reasons for
8 finding Plaintiff’s migraines “not severe,” the Court finds the Administration’s underlying
9 position was not substantially justified. *Meier*, 727 F.3d at 872 (there is a strong indication the
10 government’s position was not substantially justified when the agency’s decision is unsupported
11 by substantial evidence); *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) (“the defense of
12 basic and fundamental errors . . . is difficult to justify”).

13 The Administration has not shown substantial justification for the ALJ’s underlying
14 decision. Further, there are no special circumstances which render an EAJA award in this matter
15 unjust. Accordingly, the Court finds Plaintiff is entitled to attorney’s fees under the EAJA. *See*
16 *Meier*, 727 F.3d at 872; *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007) (“[W]e have consistently
17 held that regardless of the government’s conduct in the federal court proceedings, unreasonable
18 agency action at any level entitles the litigant to EAJA fees.”); *Tobeler*, 749 F.3d at 834.
19 (“Because the government’s *underlying* position was not substantially justified, we award fees,
20 even if the government’s *litigation* position may have been justified.” (emphasis in original)).

21 **II. Reasonableness of Fee**

22 Once the Court determines a plaintiff is entitled to a reasonable fee, “the amount of the
23 fee, of course, must be determined on the facts of each case.” *Hensley*, 461 U.S. at 429, 433 n.7.
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1 Here, Defendant does not challenge the reasonableness of the fee. Further, based on the facts and
2 circumstances of this matter and the briefing, declarations and attorney time sheet, the Court
3 concludes the amount of time incurred by Plaintiff's attorney in this matter is reasonable. *See*
4 Dkt. 16 – 16-4, 17, 18. Specifically, the Court finds Plaintiff's request for expenses in the
5 amount of \$4.31 and attorney's fees in the amount of \$4,711.03, representing 24.45 hours of
6 work, for a total award of \$4,715.34 reasonable. *See* Dkt. 16.

7 **Conclusion**

8 For the above stated reasons, the Court hereby grants Plaintiff's Motion as follows:

9 Plaintiff is awarded \$4.31 in expenses.

10 Plaintiff is awarded attorney's fees in the amount of \$4,711.03, representing 24.45 hours
11 of work, for a total award of \$4,715.34, pursuant to the EAJA and consistent with *Astrue v.*
12 *Ratliff*, 560 U.S. 586 (2010).

13 The Acting Commissioner shall contact the Department of Treasury to determine if the
14 EAJA Award is subject to any offset. If the U.S. Department of the Treasury verifies to the
15 Office of General Counsel that Plaintiff does not owe a debt, the government shall honor
16 Plaintiff's assignment of EAJA Award and pay the EAJA Award directly to Janet Leanne
17 Martinez, Plaintiff's counsel. If there is an offset, any remainder shall be made payable to
18 Plaintiff, based on the Department of the Treasury's Offset Program and standard practices, and
19 the check shall be mailed to Plaintiff's counsel at Douglas Drachler McKee & Gilbrough, 1904
20 Third Avenue, Suite 1030, Seattle, Washington 98101.

21 Dated this 20th day of April, 2017.

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24 David W. Christel
United States Magistrate Judge